WOMEN AND THE LAW IN THAILAND AND CANADA

by
Kobkun Rayanakorn

Paper Number 6, Working Paper Series
Thai Studies Project
Women in Development Consortium in Thailand
An Institutional Linkage Programme funded by
the Canadian International Development Agency

York University, Toronto
1990

Acknowledgement

This paper was prepared while Dr. Kobkun Rayanakorn was an intern in the Gender and Development Programme of the International Development Research Centre (IDRC), Ottawa, Canada.

The Women in Development Consortium in Thailand (WIDCIT) and the Thai Studies Project, York University thanks the IDRC and the Gender and Development Programme for its assistance in making this publication possible.

TABLE OF CONTENTS

Women and the Law in Thailand and Canada

Law can be both an obstacle to, and an instrument of social transformation. The problem concerning women and the law has been considered to center around three key issues. Firstly, laws are often unjust or discriminatory, limiting the rights of women. Secondly, the application of law is often arbitrary or prejudicial toward women, and thirdly, women tend to be unaware of their own legal status, of the rights they do possess, of the effect laws have on them, or even that they are the objects of injustice.[1]

Therefore, one of the important objectives of women activists is to struggle against legal inequity. In many ways Canadian laws provide a good example of a certain degree of achievement in this pursuit. And though there are still shortcomings in many legal provisions which do not satisfy feminist groups, Canadian women enjoy much better treatment under the law than Thai women.

This paper presents an attempt to conduct a general survey of Canadian laws in areas relating to women, which are also the subjects of current debates for law reforms in Thailand. It does not purport to present an in-depth discussion of Canadian law, an endeavour which the writer's expertise does not permit and which has been done abundantly by Canadian lawyers and academics.

1. Historical Subordination of Canadian and Thai women

Historically, both Canadian and Thai women shared the same fate in their subordinate position to men. According to the Husband and Wife Law dated from 1361 to 1935, Thai women were regarded as pieces of property. She could be sold by her father and if married, by her husband. A husband had a right to beat

---

1 Margaret Schuler: Empowerment & the Law, OFF International, 1986, p. 6.

his wife for correction. He was entitled to have as many wives as he wished while a wife was expected to be loyal to only one husband with cruel punishment or death penalty in case of adultery. On separation, a husband was entitled to a bigger share in the division of matrimonial property. While a husband would always receive a share in the division of property no matter whether he had come to the marriage empty-handed or not, a wife could only get one third of the property if she had come to the marriage with a certain amount of real or personal property. If she had come empty-handed, she had to leave in the same manner.

In 1935, the enactment of the Civil and Commercial Code, Book V (which dealt with family law) improved the position of Thai women tremendously. For the first time, it prescribed the concept of "one man, one wife". Women were regarded as a persons, not as pieces of property. However, the legislation maintained a large number of discriminatory provisions. For instance, according to the law, a husband was the head of the conjugal union; he chose the place of residence and directed what was to be done for maintenance and support. He had the authority to hold the rights of his wife, ranging from choice of occupation, management of matrimonial property and childbearing. Adultery as a ground for divorce was available to a husband only. Some of the injustices have been remedied by the Revised Book V of the Civil and Commercial Code which was proclaimed in October 1976. This is the law governing the status of women in family law at present. However, as will be seen later, the legislation still contains a few discriminatory provisions.

In Canada, about one hundred years preceding the enactment of the Charter, the rights of Canadian women were seriously circumscribed in and by the law. She was not able to vote, hold elected office, serve as a police constable, sit on a jury or participate in the professions. Her employment opportunities

were limited to areas of domestic work, cooking, child care, basic instruction and light manufacturing. Her wages were low and if she were married, her husband had the right to her wages even if they had separated. Upon marriage, she assumed her husband's nationality and domicile. A married women could not make a will or make binding contracts. Her real and personal property were under almost complete control of her husband. In common law, the husband had the right to determine the religion and education of the children, and he was also thought to have the right to administer "moderate correction" to a disobedient wife.

Successive waves of law reform in Canada have brought about many changes granting women the right to vote, to hold public office, to participate in the professions, to hold, use, and enjoy property on the same basis as men and to equal custody and guardianship of their children. The famous "Persons" Case was the climax of this development. This is the case in which the Privy Council, in revising the decision of the Supreme Court of Canada in interpreting the word "persons" in section 24 of the British North America Act, held that women, being "qualified persons" within the meaning of the section, could be appointed to the Senate.[2]

2. Women and the Constitution

It has long been recognized that a constitutional guarantee of equal rights between men and women is a necessity and the first step towards equality in law. This has already been achieved in many countries. In Canada, the Charter of Rights and Freedoms expressly prohibits sex-based discrimination. The two sections that directly relate to this issue are sections 15 and 28 which provide as follows:

---

2 Edwards v. A.G. Canada (1930) A.C. 124 (P.C.)

Section 15

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Both sections are to be read in the context of Section 1 of the Charter which provides that:

Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

An overall picture now is that formal legal equality has been achieved in Canada. Subsection 15(1) provides, in effect, four separate guarantees of equality, namely, equal before the law, equal under the law, equal benefit and equal protection of the law. However the achievement of formal legal equality can be characterized as only a first step. While it is an essential prerequisite to enhance the legal and social position of women,

it is only part of what is needed to reverse the effects of past subordination. It has been recognized that it is not sufficient that women should be treated the same as men. Special laws and special programs are needed to remedy the effect of centuries of discrimination. Thus subsection 15(2) of the Charter specifically renders affirmative action programs legal. This section gives constitutional credence to the concept that in order to get beyond discrimination, we sometimes have to take into account the fact that discrimination exists and in order to ensure equality, we have to treat some persons differently. The question of what kinds of strategies are needed has not been resolved and it is too early to assess the impact of this section. We shall return to this later when we discuss the problems concerning other legislation related to women.

Apart from the constitutional guarantees embodied in the Charter, Canada also has other legislation which expressly prohibits sex discrimination. Before the Charter, the Canadian Bill of Rights which came into force in 1960, had already provided the guarantees. Section 1 of the Canadian Bill of Rights provides that "it is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ...". The Act then enumerates various fundamental rights and freedoms such as right of the individual to life, liberty, security of the person, equality before the law and the protection of the law.[3]

In addition to the Canadian Bill of Rights, the Canadian Human Rights Act which came into force in 1977 provides that "race, national or ethnic origin, colour, religion, age, sex,

---

[3] Section 1 of the Canadian Bill of Rights.

marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination. The Act lists various practices which are regarded as discriminatory, such as to differentiate adversely in employment and in the provision of goods, services, facilities or accommodation.[4] How effective is this kind of legislation in dealing with the problem of discrimination and in promoting equality is a question which we shall return to later.

For the moment it is fair to say that Canada is not lacking legislation prohibiting sex discrimination. The big remaining problem seems to be what further steps should be taken in terms of legislation to be enacted and reforms to existing legislation in order to achieve equality in fact (and not simply formal legal equality under the law) between men and women.

Nothing of this can be said about Thailand. There is not even a single clause in the Constitution which guarantees equality between men and women or prohibits sex discrimination. Since 1932 when the regime of absolute monarchy was replaced by a system of constitutional monarchy and democratic government, thirteen constitutions have been proclaimed. The present Constitution was promulgated in December 1978. All previous Constitutions were all abrogated either as a result of a military coup or political turmoil. Unlike the Canadian Constitution, the Thai Constitution is embodied in a single document comprising 206 articles. Of all the Constitutions, the 1974 Constitution was the only one which provided specifically that "men and women have equal rights".[5] The reason for this is understandable. The Constitution was the product of the widespread demonstrations by

---

[4] See Sections 5-13 of the Canadian Human Rights Act.

[5] Section 28 of the 1974 Constitution of Thailand.

students in October 1973 to overthrow the military regime then in power. After the military leaders fled the country, the King appointed a civilian Government and the 1974 Constitution was proclaimed in the following year. This Constitution has been regarded as the most liberal in Thai political history. Unfortunately it was in force for only two years and was abolished as a result of a bloody coup in October 1976. Successive Constitutions, by far less liberal in a number of ways, have never recognized women's rights.

Instead, the present Constitution states simply that "all persons are equal before the law and shall enjoy equal protection under the law"[6] with no specific mention of any disadvantaged groups including women. For Thai women therefore, any constitutional guarantee for equal rights between the sexes is a thing of the past. There is no prospect in the near future that any government will give attention to this issue and amend the Constitution in order to accommodate equality rights for women. This is likely to be the situation for many years to come. In contrast to Canada, Thai Constitutional law has failed even to achieve a minimum standard of formal legal equality between men and women.

The absence of an equal protection clause for women leaves Thai women with no legal basis to challenge discriminatory practices especially in education and employment. It is legitimate for employers to put in an advertisement inviting job applications which specifies "being male" as a condition. Certain government regulations prohibit women applying for certain jobs such as a district officer, forestry officer, district accountants and so on. Some laws discriminate against women explicitly. For instance, according to the law concerning nationality, a Thai woman marrying an alien cannot confer Thai

---

6 Section 23 of the 1978 Constitution

nationality upon her child. This applies no matter whether the child is born in or outside the country [7]. On the contrary, a Thai man marrying an alien can confer Thai nationality on his child regardless of where the child is born.

The short-lived 1974 Constitution which contained an equal protection clause for men and women did bring about some improvement in the status of women. During the two-year period that the Constitution was in force, the family law was revised with an objective to equalize the spouses' position. Also, a government regulation prohibiting women to enter the judicial profession was amended. As a result, there are now about 30 women judges throughout the country. After the abrogation of the 1974 Constitution, there has been hardly any major change in the law relating to women. The only significant development was in 1982 when an amendment was made to the local Administration Act. This allows women to become village or district headmen. According to 1987 statistics, 228 women village headmen and 16 women district headmen have been elected.

Except for these changes in the law, equality rights have hardly been an issue in law reforms. Given Thai women's traditional subordinate role which already makes it difficult to compete with men in all areas, this lack of protection under the law means that Thai women are still a long way from equality.

3. Women and Criminal Law

In this section I will consider particular areas of criminal law which directly affect women and which are the subjects of debate for law reform in Thailand. This will cover laws concerning sexual offences, prostitution, abortion and domestic violence.

---

7 See Section 7 of the Nationality Act 1965 and the Revolutionary Council Order No. 337, 1972.

3.1 Sexual Offences

By the term "sexual offences", I refer to sexual offences against vulnerable people and sexual assault offences. It should be noted that under Canadian Criminal law, sexual assault offences are placed along with all other assault offences in Part Vl of the Criminal Code which concerns offences against the person and reputation, instead of in Part lV which concerns sexual offences, public morals and disorderly conduct. This stems from the principle that sexual assault is primarily an act of violence, of domination and humiliation of the victim by the aggressor, therefore, it should be based upon the inviolability of the person rather than a particular concept of morality. According to the Penal Code of Thailand, all sexual assault offences are still classified in the same group as other sexual offences.

In substance, there is no significant difference between Canadian and Thai law with regard to sexual offences against vulnerable people. For instance, in Canada it is an offence to have sexual intercourse with a female under the age of fourteen.[8] A similar offence appears in the Thai Penal Code and this applies if the female is under the age of fifteen.[9] While the Thai Penal Code provides specifically for an offence of abduction of a female person for the purpose of unlawful sexual intercourse, the Canadian law prescribes only seduction of a female person under the age of sixteen.[10] This is probably due to the fact that abduction is not so much a problem in Canada as in Thailand.

---

[8]. Section 146, Criminal Code

[9]. Formerly, this was an offence only if the female person was under the age of thirteen. An amendment was made in September, 1987 to raise the age for protection to fifteen.

[10]. Sections 151-154, Criminal Code.

With regard to sexual assault offences however, the laws of the two countries differ significantly. The law relating to sexual assault in Canada has recently been the subject of a major overhaul. By an amendment that came into force in January, 1983, Parliament has removed rape as a specific offence and created the new sexual assault offences in Section 246. The section does not give a definition of the term "sexual assault" and this has given rise to different interpretations. In R.V. Chase[11], the term "sexual" was given its narrow dictionary meaning which limited it to sexual organs or genitalia and thus, it was held that mere touching of a woman's breast was not a sexual assault. This interpretation was soon rejected in favour of a wider approval in subsequent cases. For instance, in R.V. Taylor[12], it was held that a sexual assault was "an act of force in circumstances of sexuality" and thus, includes an act which was intended to degrade or demean another person for sexual gratification and is not limited to acts of force involving the sexual organs.

It should be noted that these newly created sexual assault offences are differentiated according to the degree of violence and risk to the victim. Thus, sexual assault under Section 246.1 is an indictable offence with a maximum penalty of 10 years imprisonment; under Section 246.2, sexual assault with a weapon, threats to a third party or causing bodily harm is an indictable offence with a maximum penalty of 14 years imprisonment; and by Section 246.3, aggravated assault is an indictable offence with a maximum penalty of life imprisonment. In this way, the degree of sexual involvement is a relevant factor to be taken into account at the sentencing stage only.

The advantages of this change have been said to be the following: First, the offences are "degenderized" in that they

---

11. (1984) 40 C.R. (3rd) 282.

12. (1984) 44 C.R. (3rd) 263.

apply equally to male and female offenders and afford equal protection to male and female victims. Second, the use of the term "sexual assault" instead of "rape" will widen the circumstances under which charges can be brought[13].

There are a number of features in Canada's sexual assault law which are directly relevant to the central debate for the reform of rape laws in Thailand. Rape offence in Thailand is still given a very narrow definition. A man is said to have committed rape if he has sexual intercourse with a female person who is not his wife and the act is carried out by threat or use of force[14]. The act of "sexual intercourse" has consistently been interpreted by courts to cover only cases where there is a penile penetration of the vagina. All other sexual acts such as forced oral sex, sodomy and forcible penetration by other means are classified as indecent assaults with a lighter penalty. In this way, the Canadian approach may be a better alternative.

Another important characteristic of the rape law in Thailand is that it does not recognize marital rape. Since rape is defined as an act of sexual intercourse with a female person who is not his wife, it in effect affords to a husband immunity from prosecution for rape committed against his wife. Given a history of cohabitation and consensual intercourse between spouses, it may be difficult to prove lack of consent. However, it is a fundamental principle of the criminal law that a substantive right should not be denied because of possible procedural difficulties. In Canada, this concern seems to have been overcome. In the 1983 amendment, Section 246.8 was enacted to repeal husband's immunity. This provides that a husband or wife may be charged with an offence for sexual assault in respect of

---

13. See A New Image for Sexual Offences in Criminal Code: A Brief in Response to Bill C-53, NAWL, 1981, p.9.

14. Section 276 of the Thailand Penal Code.

his or her spouse whether or not the spouses were living together at the time the offence was committed. This corresponds with the increasing recognition of marital rape in many other jurisdiction such as New Zealand and Australia.[15] It is desirable that rape law in Thailand should be amended along this line and this has been the position taken by women's groups for many years.

On the other hand, it has been argued that the new amendment may have produced contradictory results.[16] It is said that the elimination of the specific offence of "rape" by lumping it under the same section of the Code together with other less serious forms of sexual assault would have the result of trivializing the offence. Also, Lowenberger and Landau argued that it was a positive step to abandon the need to prove penetration, but that it would have been
preferable to retain a separate category for sexual assaults involving penetration.[17]

Added to this, the defence of "honest but mistaken belief in consent" remains a stumbling block. This defence has been retained in Section 244(4) of the Criminal Code with regard to offence of general assault and it appears to be declaratory of the common law. Thus, in Pappajohn V. The Queen[18], it was held in relation to a charge of rape that an honest but mistaken belief by the accused that the victim is consenting, is a defence to the charge and that there is no requirement that the belief be based on reasonable grounds. It has been urged by some feminists

---

15. In Australia, rape reform legislation was introduced in 1975 and in New Zealand, it was introduced in 1984.

16 Ronald Hinch, "Canada's Sexual Assault Law", Canadian Public Policy, XIV, No. 3, September, 1988.

17. Lowenberger, Lois and Reva Landau (1982), "Rape by Any Other Name", Broadside, 4:8:4, as quoted in Hinch's article.

18. (1980) 52 C.C.C. (2d) 481.

that a man accused of sexual assault should not be acquitted because he mistakenly believed the woman was consenting, while other feminists believe that such a defence is justifiable if a requirement of reasonableness is added. However, the present Section 244(4) seems to give legislative form to the Pappajohn approach.

The rules of evidence applicable to Canadian law on sexual assault also deserve to be commended. Section 246.4 of the Criminal Code provides that corroboration is not required for certain offences, i.e. incest, gross indecency and sexual assault. Further, Section 246.6 states that evidence of the victim's sexual activity with persons other than the accused is not admissible with only three exceptions where the evidence is used. These are:

1. to rebut evidence, adduced by the prosecution concerning the complainant's activity or absence thereof,

2. to establish the identity of the person who has sexual contact with the complainant on the occasion set out in the charge, and

3. where the evidence concerns sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the charge and relates to the consent the accused alleges he believed was given by the complainant.

The evidence may be admitted only if the judge, after notice has been given to the prosecution and an in-camera hearing in which the victim is not a compellable witness has been held, is satisfied that the requirement of this section is met. It is further stipulated in Section 246.6(4) that the notice given and

the evidence taken, the information given or the representation made at the hearing referred to above shall not be published in any newspaper or broadcast. Also, Section 246.7 provides that reputation evidence is not admissible for the purpose of challenging or supporting the credibility of the complainant in sexual assault cases.

These provisions in Sections 246.6 and 246.7 are an improvement on the general rule of cross-examination applicable to sexual assault offences. This is based on the principle of non-harassment of victims and consideration for privacy. The relevance of sexual activity was severely criticized in the past because such evidence was regularly used to imply that there was consent, or to undermine the victim's credibility. With the introduction of these new provisions, sexual history is no longer linked to credibility. This is nothing new. In the United States in 1979, 45 American States adopted "rape shield" laws designed to limit evidence of the victim's sexual history. It is hoped that the Canadian courts will interpret these provisions in a way which will afford as much protection as was intended to victims of sexual assault offences. Some case law on Section 246.6 and 246.7 seems encouraging. In R.V. Bird and Peoples[19], it was argued that the restrictions imposed by these two sections prevented the accused from presenting a full and complete case in his defence and thus contravened Sections 7 and 11 of the Charter. This argument was rejected by the court on the grounds that the restrictions are of a procedural nature and are reasonable. It was also added that the victim has a right not to suffer the negative consequences resulting from disclosure of her sexual activity.

Finally, despite the fact that evidence concerning the victim's past sexual conduct is not admissible under the

---

19. (1984) 40 C.R. (3d) 41 (Man. Q.B.)

legislation, research has shown that the police are still reluctant to charge offenders when the sexual or social reputations of female victims leave them open to potential character assassination in court. A study by Ronald Hinch [20], based upon a review of sexual assault complaints received by the City of Halifax Police Department in 1984 shows that 50% of the women with tarnished sexual or social reputations had their complaints dismissed as unfounded but none of the complaints from other female victims alleging intercourse were concluded in this way.

It seems, therefore, that more studies and monitoring of the present provisions should be conducted in order to find the extent to which feminist concerns have been satisfied by the implementation of these new provisions.

In contrast, the Thai Penal Code contains no specific rule of evidence applicable to sexual assault offences. This, of course, leaves victims of sexual assault offences, especially of rape, with no protection from intrusive cross-examination. Thus, present evidentiary requirements make it difficult for rape victims to secure justice. Corroborated evidence that is required to convict the accused is difficult if not impossible to gather. It is not surprising therefore, that victims are usually reluctant to report the offences.

Perhaps, the most shocking feature of the rape law in Thailand is the fact that the Penal Code, by Section 281, provides that unless a rape offence is committed in the presence of third parties or the commission of the offence results in death or grievous bodily harm, it is a "compoundable" offence. This means that the parties can compromise and charges can be dropped by paying compensation. This legal provision is highly

---

20. Supra

repugnant when one considers the grievous violation of the person and dignity involved in the offence. It is unacceptable that while theft is not compoundable regardless of the amount of property involved, a serious offence such as rape should be treated as a minor offence which can be settled privately in this way.

In conclusion, it seems that although the present law on sexual assault offences in Canada has not solved all the problems and much remains to be seen whether it will produce intended results, it has advanced many steps ahead of Thailand's sexual offence law. It provides a certain level of achievement which addresses feminist concerns and which can be a model for similar law reforms in Thailand.

3.2 Prostitution

The problem concerning prostitution is particularly serious in Thailand. Poverty has driven a large number of young girls from the rural areas to become prostitutes. The Government's policy to promote tourism has accentuated the problem and economic gains are being brought about at high cost in human terms.

With regard to the position of prostitution in law, the situations in Thailand and Canada are quite similar. In both countries, prostitution is not a crime in itself but the law regulates its visibility and public nuisance problems. The substance of the laws governing prostitution in both countries may be summarized as follows. It is an offence to keep or to own a bawdy-house, to live or to be found in a bawdy-house[21] and to

---

21 Section 193, the Criminal Code of Canada
Section 1, the Restraining of Prostitution Act 1960 of Thailand

procure a person for the purpose of prostitution.[22] Further, it is an offence for a person to live wholly or in part on the avails of prostitution of another person[23]. A most significant and controversial issue in Canada is the offence of soliciting in a public place for the purpose of prostitution[24]. This last category is also an offence in Thai prostitution law.[25]

In both Canada and Thailand, the enforcement of laws on prostitution has not produced desirable results. In Thailand, the laws relating to prostitution are simply dead letters. They are loosely, if at all, enforced both at the police and the judicial levels. The extent of the problem, as world-wide publicity demonstrates, speaks for itself. In Canada, although prostitution is not so much a social problem as in Thailand, difficulties exist as to where the law should stand in relation to prostitution.

Section 195.1 of the Criminal Code in effect provides that it is an offence to solicit in a public place for the purpose of prostitution. Here the legislation has failed to offer a clear definition. In Hutt,[26] the Supreme Court of Canada held that the act must be "pressing and persistent" in order to warrant a conviction. The National Association of Women and the Law (NAWL)

---

22 Section 195(1), the Criminal Code of Canada
Sections 282-284, the Penal Code of Thailand

23 Section 195 (1), the Criminal Code of Canada
Section 286, the Penal Code

24 Section 195.1 the Criminal Code

25 Section 1, the Restraining of Prostitution Act

26 (1978) 38 C.C.C. (2d) 418 (S.C.C.)

has recommended that this offence should be removed from the Criminal Code.[27] It has been argued that Section 195.1 is enforced largely by entrapment and not by specific complaints from ordinary citizens who have been harassed. Also, it has been pointed out that the section would perpetrate the double standard of sexuality prevalent in society; that is, women are punished for making their sexuality available for a price, whereas it is acceptable for men to be sexually promiscuous. Further, the mere fact that a customer may be charged under the section does not guarantee non-discriminatory enforcement. For instance, in Toronto, in 1982, 80.8 per cent of those charged with soliciting were women.[28]

Of major concern is the fact that by restricting the ways that prostitutes can meet customers, prostitutes would be forced to rely to an even greater extent on pimps to make business contacts. The reinforcement of this dependence means that prostitutes are more vulnerable to the physical and mental abuse associated with pimping. It has been submitted that the existence of legislation against bawdy-houses is an encouragement to street soliciting rather than a deterrence to prostitution. Street soliciting is a product of the absence of more suitable and more comfortable settings in which prostitutes can meet their clients.

---

27 See Suzanne P. Boivin, "Soliciting for the Purpse of Prostitution", A Brief Presented Before the Special Committee on Pornography and Prostitution, February 1984.

28 L. McDonald, Memo to Community Groups on Soliciting. April 1983, as quoted in Boivin's article.

Much of this problem applies to a large extent in Thailand. For three decades, the laws on prostitution have remained unchanged. The Penal Code, Section 286 makes it an offence for anyone over the age of sixteen to live in whole or in part on the avails of prostitution of another person. Also it prohibits procurement of female persons for the purpose of prostitution. The major problems of the law in this area is its lack of enforcement and its being out of touch with economic reality. Low prices for agricultural produce and poverty in the rural areas mean that more and more young girls are forced to become prostitutes. Unfortunately, the government has paid little attention to this problem and still pursues its goal of the promotion of the tourist industry. The legitimization of bars and massage parlours make it more convenient to conduct the business of prostitution. This, coupled with wide scale corruption among the police means that this business is carried on with little intervention from the State. The saddest thing is it is not the prostitutes who are benefiting from the trade. Usually it is the brothel keepers, pimps and procurers of prostitutes who are getting all the fruits of their hard labour. It is highly disturbing to find that the age of young persons engaging in prostitution gets lower each year and it may have come down as low as twelve.

Further, the enforcement of the law is purely discriminatory. On any rare occasion when the police take action, only prostitutes would be arrested. Though the law allows the court a discretion to use rehabilitation measures to supplement criminal sanctions, this has proved of little value to the prostitutes. The Restraining of Prostitution Act provides that the Court, if it thinks fit, may make an order to detain prostitutes in a rehabilitation centre where they will be treated for the sexually transmitted diseases they are suffering from and where they may be provided with training in certain skills. This is supposed to enable them to engage in other occupations which

require the skills they received from their training. The detention period as specified by the Act can range up to a maximum of one year. From my study of 100 cases brought for prostitution offences at Chiangmai district court in 1984, it was found that 98 per cent of the accused escaped on bail. This should be surprising since the usual penalty inflicted by the court is only a 200 baht fine, an amount five times less than the amount forfeited for failing to appear in court. An obvious explanation given by judges and court officials was that these women feared that the court would make a recommendation to detain them in a rehabilitation centre. During the detention period, they would not be able to earn any income and this could produce hardship both on themselves and their families. Besides, the provision for skill training is of little help since it is more than likely that they would not be able to find any employment upon their release.

What then should be the position taken by the law in relation to prostitution. As we have seen above, Canada and Thailand seem to have taken similar stands and this has produced problems concerning law enforcement. In some other jurisdictions, prostitution has been legalized. Prostitution and related activities are regulated through the use of zoning by-laws, brothel licensing or licensing of the prostitutes themselves. The use of zoning by-laws confines legal prostitution to a specific area. Any prostitution activities carried on outside the defined geographical space is subject to legal sanctions. However, confining prostitution in such manner does not solve problems associated with prostitution. The concentration of prostitution tends to attract other criminal elements. Furthermore such legislation makes no attempt to deal with the social and economic causes of prostitution.

In some jurisdictions, prostitutes are required to obtain licensing and health cards from municipal authorities in order to

practice their trade. The requirement of registration only accentuates the social stigmatization endured by prostitutes. Women are often reluctant to register and, once registered, have difficulty in finding other employment. Also this type of regulation does not address the root causes of prostitution.

The legalization of prostitution in licensed brothels allows prostitutes to conduct their business in private, thereby solving the public nuisance problems which derive from street soliciting. Once again this type of licensing scheme does not solve the social and economic causes of prostitution.

From time to time, these alternative stands of the law have been a subject of debate in prostitution law reforms in Thailand. There was a time in 1985 that a proposal was made by a prominent women's group to introduce some licensing or registration scheme for prostitutes. The idea was widely opposed on the grounds that it would accentuate the social stigmatization of prostitutes, and that legalization of prostitution in this way would lower community moral standards.

Currently in Canada, there has been a suggestions from various women's organizations to repeal the Criminal Code provision concerning street soliciting. During the general election campaign in October and November, 1988, the three major political parties have given some indication of their policies in relation to prostitution. The Conservatives have stated that they would introduce amendments to the Criminal Code to strengthen provisions regarding street soliciting. These amendments would include a mandatory Parliamentary Review of the effectiveness of the legislation beginning from December 1988 onwards. The Liberals have shown disapproval of the existing legislation on street soliciting. They believe it has driven prostitution underground. The New Democratic Party is strongly opposed to what it considers the repressive criminal legislation

against prostitution. Therefore it is likely that some kind of amendments to the existing legislation will be introduced no matter which Government is elected.

Lastly, something must be said about child or juvenile prostitution. At the moment, there is no law dealing directly with the problem of child prostitution both in Canada and Thailand. The most applicable provisions are the sections concerning sexual offences committed by having sexual intercourse with a child under the age of fourteen, even with the child's consent. Also the Code provides for the offences of having sexual intercourse with female persons under the age of sixteen and seduction of female persons between sixteen and eighteen.[29] Juveniles can also be protected by the section providing that procuring a person to become a prostitute is an offence.[30] Similar provisions exist in the Penal Code of Thailand with the exception that the age of children protected from sexual offence is fifteen.[31]

These provisions have failed to deal adequately with the problems of juvenile prostitution. In Canada, the Badgley Report makes a number of recommendations with respect to the Criminal law. These include a strengthenng and broadening of Section 195 (soliciting in a public place) relating to pimps, creating an offence of buying or offering to buy sexual services from a person under eighteen and expanding the offence of soliciting.

---

29 Sections 140, 146 and 151 of the Criminal Code of Canada

30 Section 195 Criminal Code

31 Sections 277-279, 282-285, the Penal Code.

The Report also recommends restrictions on the access of children to pornography.[32] On January 1, 1988, Bill C-15, an Act to amend the Criminal Code and the Canada Evidence Act became law in Canada. This legislation contains specific provisions relating to juvenile prostitutes which impose a criminal saction against customers of young prostitutes and a harsher penalty for living on the avails of juvenile prostitution.

In Thailand, despite the seriousness of the problem concerning juvenile prostitution, the issue has received little attention from the Government. Unless economic and social programs are promoted to ameliorate the root causes of prostitution, law can hardly be an instrument for solving this problem.

3.3 Abortion

Laws on abortion have created much controversy in many countries as well as in Thailand and Canada. The difficulty is whether the right of the pregnant woman to make the choice regarding whether or not to have an abortion should be paramount to any right of the fetus and how these competing interests can be resolved. A lot of discussion centres around the question of when life begins and whether it is murder to abort the fetus.

Canada inherited from England its original law on abortion. Prior to the nineteenth centry, abortion, was only a crime if it occurred after quickening (i.e. after the mother had felt the fetus move, usually between the 16th and 20th weeks of pregnancy). In 1803 Lord Ellenborough's Act made abortion at any

---

32 Sexual Offences Against Children (1984), Report of the Committee on Sexual Offences Against Children, p. 95-97.

stage a statutory offence.[33] The abortion provisions of the Act were redrafted in 1828, 1887 and 1861. The 1861 Offences Against the Person Act made minor changes to the abortion section. Section 58 of the 1861 Act remained the law on abortion in Britain until 1967 and the basis for it in Canada until 1953. The section specified that the offence was an unlawful administering of poison or an unlawful use of instruments to procure a miscarriage. This definition implied that there might be a lawful act to procure an abortion and it was recognized by some physicians that there was a category of lawful abortions which could be induced as a therapeutic measure when the life of the mother is seriously endangered. This category was acknowledged and extended in R.V. Bourne[34], in which an abortion performed without payment on a fourteen year old girl who had been violently raped was held to be lawful.

Although limited numbers of therapeutic abortions could be done as a result of the Bourne decision, there was still much confusion over what was necessary to come within the case law test. Doctors could not be sure what was legal and what was not. Also the test in Bourne did not include eugenic, social and economic considerations as grounds for abortions. It was not until the early 1960's that there was any indication of public debate on this issue in Canada. The Canadian Medical Association and the United Church of Canada had passed resolutions at their annual meetings that abortions should be permitted where the health of the mother was at risk. In December 1968, Bill C-150 was introduced to amend the Criminal Code and became law in August 1969. The abortion provisions involved a very modest reform. It merely formalized what was already the practice in many Canadian hospitals. Its definition of therapeutic abortion was as restrictive as the definition in the Bourne decision.

---

33 43 Geo. III, C.58 (1803), U.K., Section 3.

34 (1939) 1 K.B. 687

Further, a great number of administrative and procedural requirements were added. The abortion law was contained in Section 251 of the Criminal Code. In substance, Parliament legalized abortions where they are performed in a hospital after being approved by a therapeutic abortion committee on the ground that the continuation of the pregnancy would endanger the mother's life or health. It was under this section that Dr. Morgentaler, who operates abortion clinics in major Canadian cities, was charged and subsequently acquitted.

At the same time, great changes were occurring in the United States where the abortion laws were undergoing the scrutiny of the U.S. Supreme Court. In Roe V. Wade,[35] it was decided that a woman had an unfettered right to an abortion during her first three months of pregnancy. These events along with mounting public pressure within Canada prompted the Federal Minister of Justice to appoint the "Committee on the Operation of the Abortion Law" (The Badgely Committee) to investigate and report on whether the amended abortion law was operating "equitably" across Canada. The Committee found that the procedures set out for the operation of the abortion law were not working equitably across Canada. They also found that there were sharp disparities in the distribution and the accessibility of therapeutic abortion services. They calculated that 45 per cent of Canada's population did not have access to hospitals with a therapeutic abortion committee.[36] Some hospitals lacked committees because they failed to meet the criteria laid down by Section 251 or by provinces, or because they choose not to establish a committee.

---

35 (1973) 410 U.S. 113

36 Report of the Committee on the Operation of the Abortion Law (Badgley Report), Ottawa: Minister of Supply and Services, 1977. p. 109.

With the enactment of the Charter, the abortion debate once again surfaced. Dr. Morgentaler, by opening abortion clinics in both Winnipeg, and Toronto and claiming that the abortion law is inadequate, has forced the public and the Government to consider the state of the law. Arguing on the other side of this delicate issue is an equally vocal group know as the Right to Life Association which claims that the Canadian abortion law is too lenient in allowing a woman easy access to an abortion.

In January, 1988, the Supreme Court of Canada decided a very important case affecting the law on abortion. In Morgentaler, Smoling and Scott v. The Queen [37] the accused were charged with conspiracy to procure a miscarriage contrary to SS.251(1) and 423(1)(d) of the Criminal Code. The accused were acquitted at trial but a Crown appeal against the acquittal was allowed and a new trial ordered. On appeal by the accused from the judgement of the Ontario Court of Appeal to the Supreme Court of Canada, it was argued that Section 251 of the Criminal Code was unconstitutional, inter alia, on the basis that it offends the guarantee to life, liberty and security of the person in Section 7 of the Canadian Charter of Rights and Freedoms. The Supreme Court decided that the appeal should be allowed and the acquittals restored. In the opinion of Dickson C.J.C., Section 251 of the Criminal Code does infringe the guarantee to security of the person. It interferes with a woman's bodily integrity in both a physical and emotional sense. Moreover, the operation of the decision-making mechanism set out in Section 251 causes delay for women who are successful in meeting its criteria and in the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being. While Parliament may not have intended to create delays in obtaining therapeutic abortions, the evidence demonstrated that

---

[37] Parliament may not have intended to create delays (1988) 44 D.L.R. 385

the system established by Section 251 inevitably does create significant delays. In the Court's opinion, it is not merely the purpose which is the only appropriate criteria in evaluating the consitutionality of legislation under the Charter. Thus, Section 251 infringes the guarantee to security of the person in a manner which does not accord with the principles of fundamental justice and should thus be struck down.

Therefore, the situation now is that Canada does not have specific law on abortion. In the nine months since Section 251 was struck down, the Government has not produced any draft legislation. It will depend on the newly elected Government to enact new abortion law and it is undoubtedly difficult to legislate law which satisfies all sides. The NDP have supported freedom of choice on the abortion issue while the liberals have indicated that they would support women's right to choose in the early stages of pregnancy. As for the Conservatives, they would allow a free vote to give direction on abortion legislation.

In the light of all this, on October 3 and 4. 1988 the Supreme Court of Canada heard the case of Borowski v. The Attorney-General of Canada. The action was brought by Borowski on behalf of all the fetuses. He argued that the fetus is a "person" entitled to the constitutional protections guaranteed by the Charter of Rights and Freedoms. This case had been given leave to appeal from a Saskatchewan Court of Appeal judgment before the Morgentaler decision was made. It has been argued both by the Government lawyer and by the Women's Legal Education and Action Fund (LEAF) which appeared as intervener in the case, that the case should not be heard by the court outside the context of a specific piece of legislation. This case put the court in a difficult position. It reserved its decision on whether Mr. Borowski's case ought to be heard. It allowed him to go ahead and present his evidence and arguments, including the

screening of anti-abortion films that depicted the fetus moving in the womb of its mother.

Another rival of the pro-choice movement is a cry for fathers' right to have a say in an abortion, both in the United States and Canada. In the United States, many states tried to get around the Supreme Court's 1973 Roe v. Wade decision by passing laws that required the father's notification and consent. In 1976, the U.S. Supreme Court effectively struck down these laws, ruling in the Danforth case[38] that no state legislation could "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first semester of pregnancy." In Canada, there have been several recent cases where a father has brought an application for an injunction to prevent his wife from having the abortion. The conclusion reached by the courts has been that a father has no right either in common law or statute law to be consulted with respect to the termination of a pregnancy.[39] However the assertion of parental rights is gaining momentum. In July 1988, an application made by an Edmonton man to extend a two-day injunction preventing his ex-girlfriend from having an abortion was refused by an Alberta Court of Queen's Bench judge. In her ruling, the trial judge said the father could still sue for damages if his ex-girlfriend had the abortion.

An examination of Thai abortion law presents much the same difficulty but with less intense debate and legal battle than in Canada. The law concerning abortion was enacted for the first time in 1956 and has remained unchanged. By Sections 301-305 of the Penal Code, it is an offence for a female person to procure her own miscarriage and for any person to procure the miscarriage

---

38 See Planned Parenthood of Central Missouri V. Central Missouri and Danforth (1976) 96 S. Ct. 2831.

39 See Medhurst V. Medhurst (1984) 46 O.R. (sd) 262

of any female person. However, lawful abortions can be performed by a qualified physician if he or she is of the opinion that the pregnancy of such female person would endanger her "health", or if the pregnancy is a result of the commission of rape or other sexual offences. There is no definition to the term "health" and this in practice has been interpreted broadly by physicians to cover abortions based on eugenic considerations, for instance in cases where there is a substantial chance of deformity of the fetus. Unlike in Canada, the anti-abortion movement is not so well organized and therefore unlawful abortion was widely available with virtually no opposition. However, a recent proposal to change the abortion law which would widen the circumstances in which abortion can be performed, and thereby make what has already existed in practice legal, met with opposition from some religious groups. This proposed Bill would amend Section 304 of the Penal Code, adding to it two more permitted grounds for abortions. These are abortions based on eugenic considerations and abortions where use of contraception has failed to prevent pregnancy. The Bill is expected to be introduced into Parliament in 1989.

The controversy centred around the issue of abortion reflects how difficult it is to determine where the law should stand. In Thailand, the most pressing reason for reform of the abortion law was that illegal abortions continue to exist and backstreet abortions often result in death or great danger to the health of the woman. Though abortion services are largely available in private clinics, this is beyond the reach of the poor. The only available statistics are from a study of patients admitted after having an abortion between 1968 and 1978 in a big state hospital.[40] It was found that there were 4,497 women who had to be admitted as a result of backstreet abortions. This led

---

[40] A study by Amorn Kurtsawang et al, quoted in "Facts Concerning Abortion in Thailand", 1978.

to death in many cases. It has been argued that by increasing the availability of therapeutic abortions, this undesirable cost of human life and expenses in providing treatment could be avoided.

One argument which has been advanced by the anti-abortion movement in Thailand (apart from the argument that an abortion is a murder of the fetus) is that making abortions available would encourage the society to become promiscuous. This contradicts the facts obtained from the above study which found that only 37.1 per cent of the patients were single women, and in the majority or 61.9 per cent of the cases, the patients were married women who wanted abortions for economic and social reasons.

In the final analysis, one has to admit that strict abortion law does not stop abortions from being performed. Instead, in a poor country like Thailand this has evidently led to negative results. Further, the existing law hardly corresponds with reality. It merely forces women to turn to illegal abortions. In Canada, the issue has serious implications for women's equality rights as guaranteed by the Charter. This coupled with the strong anti-abortion movement will make it even harder to legislate on the matter.

3.4 Domestic Violence

Violence can take many forms ranging from verbal violence or "threatening" to physical assault. Usually women and children are more vulnerable to intra-familial violence than men. In Canada, at least 1 in 8 women is battered by her male partner.[41] It is also reported that 36 per cent of wife abusers also abuse

---

[41] Linda MacLeod, Battered But No Beaten... Preventing Wife Battering in Canada, Ottawa, the Canadian Advisory Council on the Status of Women, 1987.

children living in the home.[42] Strictly speaking, all forms of assaults, no matter against whom they are committed, are prohibited by the criminal law. However, domestic violence seems to present more problems concerning enforcement because it is usually committed within the institution of the family. Complaints made by battered wives tend not to be treated seriously and are often regarded by the police as domestic affairs in which they should not intervene.

At the moment both Thailand and Canada have no specific laws governing domestic violence. Therefore, charges are still based on the general law of assault. In Canada, several of the Provincial Attorneys General and the Federal Solictor General have guidelines requiring the police and Crown Attorneys to lay and pursue criminal charges against assaultative partners as a matter of routine rather than as exceptional procedures.[43] The provinces which have issued guidelines regarding the processing of domestic violence cases are British Columbia, Manitoba and Ontario. These guidelines represent a marked improvement over the considerable discretion previously available to police and Crown Attorneys. A recent study regarding the use of these guidelines in Manitoba found that more domestic violence ases are being brought into the system.[44]

In Thailand, the problem of domestic violence had received little attention until 1987. In February 1987, a workshop was organized by a women's group called Women's Information Centre in Bangkok, which widely publicized the magnitude of the problem for

---

[42] Metro Torono Advisory Commitee at Reference 2

[43] Caroline J. Coates, "The Need for an Informed Response to Domestic Violence", Canadian Community Law Journal, Vol. 8 (1985), p. 53.

[44] Jane E. Ursel and Dawn Farough, "The Legal and Public Response to the New Wife. Abuse Directive in Manitoba", Canadian Journal of Criminology, Vol. 28, No. 2 (April 1986) pp. 171-172

the first time. There have been calls on the Government to introduce legal and social measures to deal with the problems. Up until now there has not been any action taken on the part of the Government. It has also been suggested that the police force should be educated to understand the problems and the necessity of strict enforcement of the law. However, no guidelines or directives have been issued.

There are a number of proposals for law reform in this area. In 1986, the Law Reform Commission (LRC) of Canada proposed that assaults committed against a spouse, child, grandchild, parent, or grandparent should be treated as aggravated assaults.[45] The proposal would differentiate between the substantive offences of assault by touching or hurting and assault by harming but would add a section listing aggravating features (familial relationship, use of a weapon) that would escalate the sentence available for the crime.[46] According to the LRC, the redefinition of the offence of assault is not necessary but the "special risk" to family members should be an aggravating feature of the offence.[47] Similarly, at the workshop on domestic violence in Bangkok in February1987, it was suggested that "spousal relationship" should be added to the list of aggravating factors in Section 289 of the Penal Code which would impose a higher sentence for the offence of assault.[48] This would have an indirect effect of creating an awareness that wife assault is a crime.

---

45 Law Reform Commission of Canada, Recodifying Criminal Law, Volume 1, Ottawa, 1986, "Report 30"

46 Ibid, pp. 58-68

47 Ibid, p. 38

48 K. Rayanakorn, "Legal Measures for Domestic Violence", a paper presented at the Workshop on Domestic Violence, Bangkok, February 1989.

Domestic violence has been criminalized as a separate offence by several American states and by the Australian State of New South Wales.[49] The proponents of this approach argue that the gathering of valuable statistics will be understood by all that wife assault is a crime.[50] However, this offence would still require dedicated law enforcement, and it has been suggested that it should be supplemented by legislation requiring mandatory arrest and prosecution in certain domestic violence situations involving bodily harm. In Australia and the United States, the traditional discretion of the police and Crown Attorneys to decide whether particular cases will be prosecuted has been eliminated or curtailed by state legislation. For instance, in Mississippi, "every law enforcement official who receives a report of domestic violence must immediately file charges against the abuser on behalf of the victim if the facts submitted to him or her are sufficient."[51] The main objective of such laws is to transform prosecutorial attitudes and policies and to increase conviction rates for wife assault.

There are some disadvantages associated with this type of "no drop" law. One obvious problem is the question of abused partners' reluctance to testify and that women may be forced to choose between imprisonment for contempt and testifying in court. It has been suggested that a possible legislative solution to this problem is to adopt a legislative exception along the lines

---

[49] See Elizabeth L. A. Sheehy, Personal Autonomy and the Criminal Law: Emerging Issues for Women, Canadian Advisory Counsil on the Status of Women, September 1987, p. 13

[50] Lisa G. Lerman and Sharon Goldzweig," Protection of Battered Women: A Survey of State Legislation" Women's Rights Law Reporters, vol. 6, no. 4, 1980, pp. 271-284, as quoted in Sheehy's paper.

[51] Lisa G. Lerman and Franci Livingston, "State Legislation on Somestic Violence", Respnse to Violence in the Family and Sexual Assault, vol. 6, no. 5, 1983, p. 1-28 as quoted in Sheehy's paper.

of the New South Wales Act. Under this legislaiton, the prosecutor has no discretion to drop charges, and usually a reluctant victim must testify. However, the judge hearing the charges has the power to excuse the witness from testifying "having regard to the availability of other evidence and the seriousness of the offence in question",[52] provided that the decision by the victim was made without fear or coercion.

The legal measures suggested above should be considered for law reforms in relation to domestic violence in Canada and Thailand. Changes could be made to both the substantive law of assault and the procedural laws regarding arrest and prosecution of charges. Along with this, there should be police training and victim support services such as shelters and counselling to provide effective solutions to the problem.

4. Women and Family Law

The topics concerning family law are generally broad and difficult. In Canada, this area of law is further complicated by the fact that most family law matters fall within provincial authority. The Canadian Constitution grants to the federal Parliament exclusive authority to legislate regarding the capacity to marry and divorce.[53] These laws apply across Canada and are the same in all jurisdictions. The provinces may make laws about all other aspects of marriage breakdown, such as property division, support of spouses and children, and custody.[54] Thus the law relating to these issues varies widely across Canada. In Thailand, virtually all family law provisions are contained in the Civil and Commercial Code (CCC), Book V, 1976.

---

52 See Sheehy, Supra, p. 18

53 The Constitution Act 1867, Section 92 (26)

54 Ibid, Section 92 (12) and (13)

The focus for family law reforms is also very different between Thailand and Canada. In Thailand, most of the dissatisfaction centres around some discriminatory provisions in the CCC, Book V. The provisions often cited are the sections dealing with the subject of betrothal and the sections specifying grounds for divorce. Surprisingly little discussion, and I have not come across any, is given to the consequences of divorce or marriange breakdown. In Canada, on the other hand, the debates now concern mainly with issues following a marriage breakdown, namely questions of maintenance and support, access and custody, and appropriate procedure for settling marital disputes.

4.1 Betrothel

I pick out this topic because it has generated quite an amount of debate in Thailand whereas in Canada, this is hardly an issue. According to common law in Canada, a promise to marry another person is recognized as a legally binding contract. An engagement gift, almost always a ring, is given as a bond indicating that the couple has agreed to wed. If the parties mutually agree to break off the engagement, the woman is obliged to return the gift. On the other hand, if the man calls off the engagement without a valid reason, the woman is free to keep the gift. While the courts cannot compel the parties to marry, a party has the right to sue the breaching party for damages such as damage to one's pride and feelings and loss of money in preparing for the wedding ceremony.[55]

Much of the same principle applies in the CCC, Book V.[56] In addition, the law specifies the age at which a couple can legally enter into an engagement contract. Section 1437 provides that an

---

55 M.J. Dymond (ed), The Canadian Woman's Legal Guide, Doubleday Canada Ltd., Toronto, 1987, pp. 112-113.

56 CCC, Book V, Seciton 1435-1447

engagement can take place only if the man and the woman have reached the age of seventeen.

The provisions which have been constantly criticized are those which seem to reflect the prevalent concept that treats a woman as a piece of property. For instance, by Section 1437(3), a man may give betrothal security to the parents or guardian of the women in return for the woman agreeing to marry. If the marriage does not take place, the man may claim the return of the property. Of particular concern to feminists are the sections which provide for renunciation of a betrothal agreement. Section 1445 provides that a man who is betrothed to a woman may, after having renounced the betrothal agreement, claim compensation from any man who has had sexual intercourse with the woman and has known or ought to have known of her betrothal. Further, Section 1446 provides that a man who is betrothed to a woman may, without having to renounce the betrothal agreement, claim compensation from any man who has had sexual intercourse or attempted to have sexual intercourse with the woman against her will, if the fact that the woman had been betrothed has been known to him.

These seem to be peculiar provisions and even more so when considering the fact that the CCC, Book V, 1976 is a revised version of family law with an aim to equalize the status of men and women. As stated earlier, this revision was prompted by the specific provision of equality rights between men and women in the 1974 Constitution. It is strange that an act of sexual intercourse committed on the body of a female person should give rise to a claim for compensation on the part of her fiancé. This is so even if the woman has consented to the act. One cannot help concluding that these provisions are to reinforce certain cultural values in Thai society that hold a woman to be property belonging to her parents before marriage, to her fiancé once engaged, and to her husband once married.

4.2 Formation of Marriage

In order for a marriage to be valid, several requirements must be met. These concerns relate to age, mental competence, consent, consangunity or affinity, and monogamy.

In substance the law of the two countries are quite similar in their requirements for creating a valid marriage. According to the CCC, Book V of Thailand, Section 1448, the minimum age for marriage of both male and female is seventeen. The age of majority under Thai law is twenty. Any person below the age of majority and who wished to marry must obtain his or her parents' consent. If the parents unreasonably withhold their consent, he or she can appeal the parental decision to the court. Marriages between people related by consangunity, affinity and adoption are prohibited. Other essential capacities as specified by Thai law are that there must be no prior existing marriage and the couple must not be insane at the time of the marriage.[57]

It is worth noting that the law recognizes the principle of monogamy despite the fact that under the former Husband and Wife Law dated from 1361 to 1935, a man could legally have as many wives as he could afford to. Today the law permits a man to have only one wife but it is still quite a common social phenomenon that a man has more than one wife. Unlike Canadian law, bigamy is not a criminal offence under Thai law.

The CCC, Book V does not specify ceremonial requirement for a marriage. A valid marriage can be created simply by registering it at a district office with the consent of both parties, whereby a certificate of marriage is issued. According to Section 1457, only registered marriages are considered to be valid. Thus the law does not recognize cohabitation without a

---

57 Ibid, Section 1448 - 1454

marriage certificate; the union of a man and a woman does not confer mutual conjugal rights and obligations.

In Canada, the federal government has authority to legislate on the topic of marital capacity but it has not generally done so. That being the case, it is the common law as modified by any relevant statutes that governs. While in common law, the minimum age for marriage of male was fourteen and a female was twelve, these being the ages at which the sexes were considered capable of reproduction, today the age at which a person can marry has been raised by virtue of the provinces' and territories' enactment of statutes requiring parental consent to marriage below a certain age. This age limit which varies across Canada, may be as low as twelve or as high as eighteen. The age at which a person may marry without parental consent is sixteen in Newfoundland, eighteen in Alberta, Manitoba, Ontario, Prince Edward Island, Saskatchewan and New Brunswick, nineteen in Nova Scotia, British Columbia, the Northwest Territories and the Yukon Territory. In Quebec, a girl may marry at twelve and a boy at fourteen.[58]

With regard to the formalities concerning marriage, the province has the power under Section 92 (12) of the Constitution Act, 1967, to legislate for the solemnization of marriage. The provinces have enacted recent, comprehensive legislation concerning marriage. For instance, in Ontario, the Marriage Act deals with such preliminary formalities as the need for a licence or banns, who can officiate, the form of the ceremony, and registration of the marriage.[59] All of these provisions clearly relate to the formal validity of marriage and the province has

---

[58] M.J. Dymond, The Canadian Woman's Legal Guide, supra, p. 117

[59] See the Marriage Act, R.S.O. 1980, Chap 256.

the constitutional power to legislate that any marriage which does not comply is invalid.

One point I would like to make with regard to formalities concerning marriage is that Canadian law seems to specify more ceremonial requirements whereas the Thai law only requires registration. This is probably due to religious influences that have rooted the concept of the family and the sanctity of marriage deeply into Canadian society. It also explains why it is much more difficult to get a divorce under Canadian law than under Thai law.

Upon marriage, a Thai woman must adopt her husband 's surname.[60] This has given rise to concern for some middle class women who wish to retain their maiden name or hyphenate their surname and that of their husband. In 1984, a draft legislation was introduced into Parliament to amend the Person's Name Act. The amendment would allow women to elect to keep their maiden name or to use their husband's name. This proposal did not pass the first reading. Therefore, married women are still compelled to use their husband's surname. In Canada, there is no legislation on the matter and it is generaly understood that there is no legal obligation for women to adopt their husband's name.

4.3 Divorce

In Thailand, the law specifying grounds for divorce is the area of family law which attracts most criticism from feminists. The attack is centred around the double standard in the provision. The Civil and Commercial Code, Book V, which was first enacted in 1935, recognized the western concept of monogamy. However, as stated at the beginning of this paper, this early version of the family law still discriminated against

---

60 The Person's Name Act, 1962

women in many ways. As far as divorce is concerned, the 1935 family law provided that adultery as a ground for divorce was available only to a husband.

When the family law was revised in compliance with the equality rights clause in the 1974 Constitution, an attempt was made to improve the obviously unequal treatment of women in the family law. Women are now given equal right in the management of matrimonial property and in the exercise of parental rights. They are also entitled to equal share in the division of property upon marriage breakdown. As regards divorce, the present Section 1516 of the CCC, Book V lists ten grounds which a spouse may invoke for divorce. Some of the grounds listed are based on the principle of fault or matrimonial offence and some are based on the concept of permanent marriage breakdown. The matrimonial offence grounds include for example adultery, grievous misconduct, physical and mental cruelty. The grounds for divorce based on permanent marriage breakdown include whereabouts of spouse unknown, nonconsummation, desertion, and illness through transmitted diseases.

The provision in question which is constantly attacked is subsection (1) concerning adultery ground. This subsection provides that where a husband has given maintenance to or honoured such other woman as his wife or where a wife commits adultery, the other spouse may enter a claim for divorce. Reading this subsection carefully, one can see a subtle discrimination against women. In order to file a divorce action, it is not enough for a wife to prove that her husband has committed adultery. She must show that her husband has given maintenance or honoured another woman as his wife whereas a husband needs only prove that his wife has committed adultery.

Although this provision is a marked improvement on the previous law which allowed the husband alone to invoke adultery

as a ground with virtually no comparable ground available to women, it certainly implies an underlying value in Thai society where it is acceptable for men to be promiscuous. When it comes to women, the society applies a much stricter standard. It puts a high value on women's virginity before marriage and it bears an expectation of women's being a good housewife and loyal to only one man after marrriage.

Where a divorce is uncontested, it is far easier to obtain in Thailand than in Canada. Sections 1514 and 1515 of the CCC, Book V provide that where a divorce is uncontested, it is completed by registering an agreement to divorce with an appropriate authority, which is usually a district office. This must be accompanied by another written agreement specifying the spouse who will have custody of the children and the[61] amount of support each spouse would contribute. If no agreement can be reached as to custody and support, this will be determined by the court. In practice, however, few people would go to court. The parties would normally reach an agreement to complete a divorce procedure. No study has yet been conducted as to the consequences of divorce. This may be due to the fact that divorce is an uncommon phenomenon in Thai society. Or it may mean that there are so few feminist lawyers that all aspects of the law relating to women have not yet been looked into.

Thus, the divorce procedure in Thailand is more or less close to the system of "divorce on demand". When both parties agree to divorce, there is no need to show that the divorce is based on any of the enumerated grounds. Only when the divorce is contested does it become necessary to prove one of the grounds in court.

---

61 The CCC, Book V, Section 1514-1515, 1520 and 1522

In Canada, prior to 1968, the divorce law varied from province to province. Judicial divorce was introduced in Ontario in 1930 by the Divorce Act (Ontario), S.C. 1930, C.14. By 1967, judicial divorce could be obtained in Alberta, British Columbia, Manitoba, the Northwest Territories, Ontario, Saskatchewan, and the Yukon Territory on the following grounds. A husband could obtain a divorce only by proving his wife's adultery. A wife could petition on the grounds of adultery, rape, sodomy, bestiality or bigamy. Unlike the other provinces, New Brunswick, Nova Scotia and Prince Edward Island each enacted a divorce law prior to Confederation. By Section 129 of the B.N.A. Act, these laws continued in effect until the Parliament of Canada enacted the Divorce Act of 1968. In all of these provinces, adultery was a ground for divorce. In New Brunswick and Prince Edward Island, frigidity was also a ground. Divorce on the basis of cruelty was available only in Nova Scotia.

Section 23 of the Divorce Act 1968 repealed all prior divorce laws. This statute provided for the first time a Canada-wide law of divorce. It introduced the concept of permanent marriage breakdown as a ground for divorce. Section 4 of the Act provided that where a husband and wife were living separate and apart, a petition could be brought on the ground that there had been a permanent breakdown of marriage by reason of one of the circumstances listed in Section 4(1). The circumstances listed include imprisonment, alcohol or narcotic addiction, whereabout of spouse unknown, nonconsummation, separation and petitioner's desertion.

Thus under the 1968 Act, a divorce could be granted, based on either fault grounds or breakdown grounds. There was no general right to divorce outside the scope of the enumerated grounds. As far as fault grounds are concerned, the Act gave to a court jurisdiciton to grant a divorce based on adultery, cruelty, bestiality, sodomy, homosexual act or form of marriage

with another person. Such fault grounds entitled the innocent party to bring proceedings for divorce against a guilty party immediately.

Before the enactment of the 1968 Act, there had been discussion as to whether divorce on the ground of matrimonial offence should be abandoned. The special Joint Committee of the Senate and House of Commons on Divorce recommended the retention of this ground.[62] The Committee stated numerous advantages of the matrimonial offence idea. It was said to be a definite system generally understood by the public at large. Also it provided security for a marital relationship, especially for the wife past middle age who had lost her youthful charm and whose husband had a roving eye. The Committee concluded that it would be difficult to dispense with the matrimonial offence completely. Since most people regarded marriage as an institution which provided certain specific rights and duties for the spouses in respect of each other, a spouse should have the right to an immediate divorce if the other departed from the standard of marital fidelity.

On the other hand, retention of the fault grounds was criticized as being based on the unrealistic assumption that causes of marriage breakdown could be specified in a limited list of behaviours. Beginning with accusations of misconduct, the original marital conflict could easily escalate into an unproductive round of counter-accusations and reprisals. Such a process would discourage any inclination either spouse might have to attempt reconciliation or to co-operate in resolving such issue as maintenance or child custody.

---

62 See the Report of the Special Joint Committee, 1967, pp. 103-104, Reproduced in Hovius, Cases, Notes and Materials on Family Law.

Whatever the case may be, the Divorce Act 1985 repeals the Divorce Act 1968 in its entirety and substitutes a new code for divorce including jurisdiction, grounds for divorce and corollary relief. By Section 8 of the Act, marriage breakdown is now the sole ground for divorce. Breakdown of the marriage is established if the spouses have lived separate and apart for at least one year, or one spouse has committed adultery or cruelty. When proceeding on the basis of marriage breakdown pursuant to Section 8, it is no longer necessary to wait until the statutory separation period has accrued before commencing the divorce proceeding. The proceeding may be commenced immediately following separation as long as the divorce decree itself is not granted until the expiry of the one-year period.

This new provision makes it easier to obtain a divorce. Formerly under the 1968 Act, a divorce based on fault grounds would often be granted as soon as the courts had time to deal with the case. But if marriage breakdown grounds were used, the spouses had to wait for a separation period of three years (for the deserted spouse) or five years (for the deserting spouse). Also under the 1968 Act there is no longer a requirement that a formal trial be held. Section 25 of the Act gives wide power to provincial rule-making bodies to make rules governing divorce practices and procedures including the manner in which the divorce comes before the court. Further, the rule-making bodies may make rules providing for the disposition of a divorce proceeding without an oral hearing. The intent is to permit the provincial rule-making bodies to limit trials to those cases where they are absolutely necessary and to eliminate those where no issues are contested. In Ontario, the procedural rules are contained in O. Reg. 560/84. These rules permit "divorce by affidavit" without an oral hearing in uncontested cases.

Thus there is a move by the law to relax the divorce procedure in Canada. It is normally done by a registrar who,

having examined the petition and accompanying affidavit and if he is satisfied, certifies that the petitioner is entitled to a decree and sends the case to a judge for the Decree Nisi to be announced in open court. This has an advantage of reducing the adversarial nature of divorce proceedings and saving court time and costs. However, it also means that divorce procedure is now becoming an administrative matter and there is a risk that some divorces may be obtained on grounds that are legally insufficient.

The change in Canadian divorce law is part of the trend which was happening between 1969 and 1985 in nearly every Western country. The chief common characteristics of all these changes were the recognition or expansion of non fault grounds for divorce, and the acceptance or simplification of divorce by mutual consent. In 1969 California became the first Western jurisdiction to eliminate fault grounds for divorce. In that same year England passed a new divorce law which purported to make divorce available only when a marriage had irretrievably broken down. The English statute permitted marriage breakdown to be proved by evidence of traditional marital offences, such as adultery and cruelty, as well as by long separation. This English type of compromise statute seems to be the approach adopted in Canada.[63] However, under the English system, mutual-consent divorce is available after a two-year separation and unilaterial non-fault divorce is permitted only after the spouses have lived apart for at least five years.[64] Therefore, the Canadian divorce law which requires only one-year separation presents a much more radical change.

---

[63] See Mary Ann Glendon, Abortion and Divorce in Western Law, Harvard University Press, Cambridge, 1987, pp. 66-67

[64] The Divorce Reform Act of 1969. It is now consolidated in the Matrimonial Causes Act 1973, as amended by the Matrimonial and Family Proceedings Act. 1984.

In one respect the abandonment of fault grounds can be detrimental for women. Its retention could give a considerable bargaining advantage to a legally innocent spouse whose partner was impatient to get a divorce. Negotiating practices developed in which one spouse might exchange cooperation in obtainng a divorce for economic concessions from the other. In this way, the fault-based system could and often did operate so as to afford some economic protection to a dependent wife and children when a family broke up. To the extent that the new divorce laws made it possible or even easy for one spouse to obtain a divorce in spite of the opposition of the other, and made fault less relevant or even irrelevant to property and support issues, the dynamics of bargaining over finances were significantly altered. In this way, changes in the grounds of divorce may not work to the advantage for women. For the time being, this line of changes is probably not suitable for Thailand where there is still a lack of adequate laws governing alimony and child support.

4.4 Child Custody and Access

There is literaly no writing on the subject of child custody and access in Thailand. In cases of divorce by mutual consent, the parties must agree as to who will have custody of the children and as to the proportion of child support each spouse must contribute. If, no agreement is reached, these issues will be determined by the court. In cases where the divorce is contested and is based on a ground listed in Section 1516 as stated earlier, a divorce decree will be issued by the court and the spouse who has won the case will have custody of the children unless otherwise determined. No guidance is given to the courts in awarding custody. In the absence of research and discussion on the problems, I find it difficult to make any assessment of the law. However, there is certainly a need for Parliament to legislate more specifically and in more detail in this area.

In contrast, the issues of child custody and access in Canada are among the most hotly debated problems in the area of family law. Here custody and access orders can be made both under the Divorce Act, 1985 and under provincial law. In Ontario, custody and access applications are governed by Part III of the Children's Law Reform Act, 1980. Section 21 of the Act provides that where the parents cannot agree on custody or access, either can apply for a court order. Further, Section 24(1) specifies that custody and access issues are to be determined on the basis of the best interests of the child.

Under the Divorce Act, 1985, custody and access orders can be made in divorce proceedings or in corollary relief proceedings after the divorce. Section 16(1) provides that a court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to any or all children of the marriage. Section 16(8) stipulates that in making a custody or access order, "the court shall take into consideration only the best interest of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child. Section 16(9) and (10) provides further guidance for the courts.

Of particular concern to feminists is Section 16(10), the so-called "friendly parent" rule. This subsection provides that in making an order, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." It has been argued by the National Association of Women and the Law that women may be deterred from making complaints concerning physical, emotional or sexual abuse of themselves or the children. Raising such concerns in divorce

or mediation proceedings may make them seen as vindictive and uncooperative and thus put them at risk of losing their children to the abuser.[65] However, no case has been cited of women losing custody for this reason. It appears that some lawyers do advise their clients not to raise such complaints lest they should have negative impact on the attitude of the judges.

Another topic strongly debated in Canada at present is the issue of joint custody. While orders for sole custody to one parent and access to the other continue to be used in most cases, the court has authority under both the Children's Law Reform Act and the Divorce Act, 1985, to deviate from this model. Section 16(4) of the Divorce Act explicitly states that the court may grant "custody of, or access to, any or all children of the marriage to any one or more person". This coupled with the "Friendly parent" provision in Section 16(10) make joint custody available as an option.

The idea of joint custody has been received with enthusiasm from groups which are often termed as "fathers' rights" groups. Of these, the group which has been most involved in the question of custody is the Canadian Council for Co-parenting. They are proponents of laws mandating joint custody, except in cases where it was against the child's best interest. The council alleges that the courts are biased against fathers because mothers get custody more often. It is claimed that mothers obtain custody in 85 to 90 per cent of all cases. This statistic is generally accepted even by feminists. Yet the point which women's groups consistently make is that few divorcing fathers seek custody and

---

65 Louis Lamb, "Custody Reform", the National Association of Women & the Law Newsletter, Vol 7, No. 2, October 1986.

about three-quarters of all divorces involving children are uncontested.[66]

No Canadian province has yet enacted legislation specifically making joint custody a preference in child custody arrangements or authorizing joint custody in the face of opposition by one or both parents. A private member's Bill advocating mandatory joint custody was proposed in February 1988 by Dr. James Henderson, a Liberal backbencher in Ontario.[67] The purpose of the Bill is to create a legal presumption that custody of a child should be granted jointly to both the child's parents when both parents are seeking custody. The presumption is rebutted if the court determines that joint custody is not in the best interests of the child. The effect of this proposed legislation would make Canadian law on child custody somewhat similar to that adopted by some 32 states in the United States with California being most often cited as the model. However, this Bill is unlikely to get very far.

The idea of mandatory joint custody has been generally resisted by feminist groups in Canada. In their view, since joint legal custody often means that both parents continue to have joint legal responsiblity for the child's upbringing, it may impede the ability of the primary-caretaker, usually the mother to make needed and timely decisions. It has also been argued that most fathers who demand joint custody do not want to have actual physical control of the children but rather, they want to be involved in decision-making. In this sense forcing joint custody is seen to represent "post divorce patriarchy", a way for

---

66 Rona Maynard, "Fathers' Rights", Chatelaine, November 1988. pp 61-63._

67 See Bill 95, An Act to amend the Children's Law Reform Act, printed under authority of the Legislative Assembly by the Queen's Printer for Ontario.

men to maintain power over their ex-wives.[68] There has also been concern that if mandatory joint custody is available in law, this may be used by the husband to bargain out of court for a reduction in child support payments and that women will give up some of their financial rights in order to keep their children. Furthermore, forcing joint custody gives an abusive husband a key for perpetual acces to his ex-wife and children.

At the same time it has been urged by some writers that the court should order joint custody. One author has pointed out that there are a number of social trends indicating that more women are pursuing careers outside the home, while men are participating to a far greater extent in child rearing and household maintenance functions. Thus the sole custody concept is a product of a world that no longer exsits. He cited many studies which show that post-divorce mothers with sole custody feel overburdened by their children whereas divorcing fathers are not sufficiently burdened. Also it is pointed out that many research findings indicate that "joint custody children made a relatively easy adjustment to the demands of living in two households.[69]

Whereas it is understandable why joint custody should be favoured in view of its advantage in allowing meaningful contact between the child and both parents, some studies show that it is not necessarily beneficial to the children. A. U.S. research by Dr. Judith Wallerstein from the Centre for the Family in Transition in California, shows that in 100 families where parents had been forced into joint custody, the children were

---

[68] See Phyllis Chester, Mothers on Trial, 1986, as quoted in Rosa Maynard's article.

[69] See Ryan, "Joint Custody in Canada: Time for a Second Look", (1986), 49 R.F.L. (2d) 119.

more emotionally troubled, depressed, and withdrawn than children under the custody of one parent.[70]

As far as the law in this area is concerned, joint custody appears to be governed by two cases of the Ontario Court of Appeal which were decided early in the debate over joint custody and which have since been followed elsewhere in Canada. In Baker V. Baker[71] the Court of Appeal, in overturning the trial judgement, decided that parents must be able and willing to co-operate as loving parents before joint custody can be awarded. It may not be accurate to say that the court did not favour joint custody per se. The Baker Case was not an appropriate case for joint custody. Neither party requested or wanted joint custody. Both had demonstrated an inability to coperate in matters concerning the child.

In Kruger V. Kruger [72] which was decided two months later, the highest court of Ontario once again declined to award joint custody in the absence of the agreement of both parties. In this case, the parents had cooperated in a de facto shared parenting arrangement prior to trial and the father had requested an order for joint custody in appealing an award of sole custody to the mother. A majority of the court held that the fact that there was "agreement" between the parties on the subject of joint custody was a major consideration in deciding whether to order it. From the lack of agreement the court seemed to infer an unwillingess or inability of the parents to cooperate in child rearing.

---

70 The Toronto Star, "Solving Custody Wars No Small Task", August 27, 1988.

71 (1972) 23 O.R. (2d) 391

72 (1972), 25 O.R. (2d) 673

For advocates of joint custody, the decisions in Baker and Kruger slowed the acceptance of joint custody as an option. However, there are some recent decisions in which the courts did award joint custody despite objections from one or more of the parents. In Darling V. Chung[73] the Ontario Supreme Court awarded joint custody of three children to their parents despite the father's vigorous objections to the arrangment. According to the judge, he was compelled to grant joint custody in spite of the father's strong objections because it was in the best interest of the children. Similarly in Nurmi V. Nurmi,[74] a Hamilton-Wentworth District Court judge decided to award joint custody of a five year old child to his parents over the mother's objections. In her opinion, the mother's desire to retain control of her son was "not sufficient reason to deprive her child of a shared parenting arrangement which would provide to him the maximum amount of effective parenting available from the two adults in his life."

Therefore, there is some indication that judges are moving in the direction of joint custody. The fact that some joint custody orders are being made without both parents' consent has raised concerns among feminists. They are of the opinion that cooperation and compromise cannot be court ordered. Unfortunately, this is the area where the existing joint custody research assists us least. No studies have yet been completed that compare "court ordered" and "voluntary" joint custody families. Most of those joint custody families which have been studied chose joint custody freely and thus were highly motivated

---

73 The Lawyers Weekly, Ontario. Vol. 8, No. 12, July 15, 1988.

74 The Lawyers Weekly, Ontario, Vol. 8, No. 22, October 14, 1988.

to make it work.[75] Therefore one must take care not to generalize about joint custody families on the basis of data obtained from biased samples.

In the light of these conflicting views, it is perhaps not advisable for law to favour joint custody. However, joint custody should continue to be available as an option for parents who want it and for children who can handle it. An alternative to joint custody has been proposed by some feminists. This is based on exisiting West Virginia law which gives preference to the "primary caretaker parent", defined as the one who, during marriage, does most of the childcare work, such as preparing meals, dressing and bathing the child and interacting with the child's friends and school authorities.[76] Though it may be argued that this type of provision is gender-neutral, it can also easily interpreted as giving maternal preference, especially by fathers' rights groups. In this way, I cannot see how it could solve the current custody debate in Canada.

Along with the issue of custody is the problem concerning access. In Thailand, there is no legislation on the question of access. In Canada, much of the discussion concerns enforcement of access orders. Under both the Children's Law Reform Act and the Divorce Act, 1985, the parent with access has more than visitation rights. He or she also has the right to make inquiries and to be given information regarding the health,

---

[75] See The Politics and Experience of Co-Parenting: An Exploration Study of Shared Custody in Canada, CRIAW paper by Cerise Morris, Social Service Department, Dawson College. The paper in effect supports shared parenting. However, most of the 43 Canadian families studied had voluntary co-parenting arrangements.

[76] Linda Silver Dranoff, "Joint Custody, Controversial Cure-All", Chatelaine, May 1987.

education and welfare of the child.[77] The denial of access is treated as contempt of court. The normal means of punishment are censure, fine or imprisonment. However, none of these would solve the problem. Fines would simply reduce the family income of the lower income family. Also courts are extremely reluctant to put a custodial parent in jail since this would not be in the best interest of the child.

The Ontario Government has recently introduced legislation intended to allow more effective enforcement of access orders.[78] The proposed legislation would allow, inter alia, access parents to apply to the courts to have access orders or agreements varied to refer to specific times or days for access. An access parent who has been wrongfully denied access could also apply to the court for relief. Such reliefs include ordering compensatory access for a period not longer than the period of access actually denied, supervision of custody or access and ordering the custodial parent to reimburse the access parent entitled to access for any reasonable expenses actually incurred as a result of the wrongful denial of access.

In Manitoba, a parental access assistance program has been developed by the Attorney General's Department and the Ministry of Community Services. This is a three-year project designed to help parents without custody obtain secure access to their children.

These types of proposed legislation and programs have been supported by fathers' rights group as a step in the direction of making family law fairer to men who in almost 90 per cent of divorces do not have custody of their children. As may be

---

[77] Section 20(5) of the Children's Law Reform Act and Section 16(5) of the Divorce Act, 1985.

[78] See Children's Law Amendment Act, 1988, Bill 124

predicted, such development is viewed by feminists as having the potential for harassment of women, especially battered women. In their opinion, there is no evidence that access violations have become a national problem rivaling the problem of unpaid child support. Whereas the rate of default in child support used to be as high as 75 per cent a few years ago, the 1987 federal study of divorce found that custodial parents denied visiting rights just 7 per cent of the time.[79]

To a certain extent, the latest version of the proposed Children Law Reform Amendment Act for Ontario has addressed some of feminists' concern. It would allow custodial parents to deny access if they have reason to beieve that the visit would cause physical or emotional harm to the children. Drunkenness and history of domestic violence are relevant factors to be taken into consideration by the courts in determining whether a denial of access is wrongful.[80] This version of the proposed legislation has drawn criticism from some fathers' rights group.

It seems therefore that problems of custody and access in Canada are very complex issues with no easy legislative solution. For a country like Thailand which has provided practially no legislation on the issues, the Canadian experience is both interesting and valuable for its future enactment of the law in this area.

4.5 Division of Matrimonial Property

The matrimonial property regime in Thailand is the community of property system. This system is based on the assumption that the marriage is an economic partnership. The earnings and

---

79 Rona Maynard, "Fathers'Rights", supra, Chatelaine, November 1988, p. 140

80 See Sections 24(3), 35a(4) of the Bill

property acquired by the efforts of either spouse become community property in which each spouse has a present legal interest. In the event of dissolution of the marraige, the community property, after payment of community debts, is divided equally between the spouses.

The provisions concerning matrimonial property in Thailand are contained in Sections 1465-1493 of the CCC, Book V, 1976. In principle the law recognizes two kinds of property: the separate property of each spouse and community property. Any property owned by either spouse before marriage or acquired by either spouse by way of gift or inheritance during the marriage is treated as the separate property of that spouse. This property is not shared on the termination of the marrriage but is owned by the owner-spouse. All other property, however acquired, becomes community property wich must be shared equally.

Traditionally the husband had sole power in the management of matrimonial property and this was what the CCC, Book V of 1935 provided. Naturally, this generated a lot of criticism from women. The newly revised CCC, Book V of 1976 has changed this. The husband and wife now have joint management powers in community property. Any dealing with this part of property cannot be done without the other spouse's consent. There are rules which regulate the extent to which community property is liable for the discharge of contractual obligations or debts incurred by either spouse.

Generally, the division of matrimonial property in Thailand is still a complex matter left largely to lawyers. Property owned by either spouse is presumed in law to be community property unless it can be proved to be separate property. Therefore if the spouses do not maintain adequate records of the source of funds used to acquire property, problems of tracing or of co-mingling will inevitably ensue. However as far as the protection for women's rights is concerned, this part of the

family law does not seem to provoke criticism especially since the law now affords equal rights to the wife in the management of the common assets. Also it appears that the law recognizes the differing contributions of both spouses and allocates their property rights as the financial and economic fortunes of the marriage progress. Further it has psychological advantages for the home-making wife to feel that she has a legitimate stake in the marriage. Thus, despite its potential complexities, the law here has not prompted serious criticism from feminists.

In Canada, property rights between husbands and wives are matters which come within provincial jurisdiction. Thus the law may vary from province to province. However, in most provinces, the economic and emotional contribution that women make in the home is now recognized. Also generally both parties are deemed to have an interest in important assets such as a matrimonial home no matter in whose name the title of the asset may be.

In Ontario, the matrimonial property regime adopted is a system of separate property with deferred sharing. The law in this area is now governed by the Family Law Act, 1978. Under the previous legislation, each spouse had equal rights to all family assets. Since family assets did not include assets such as pensions, RRSPs, or stocks and bonds, which were normally owned by the income-earning spouse, the other spouse was often left with significantly fewer assets than his or her partner. This was particularly unfair to women who were mostly home makers. Another instance of unfairness was that the property division rules only applied to marriage ended by separation or divorce. It did not apply to marriage ended by death.

The Family Law Act, 1986, makes no distinction between family and non-family assets. Also spouses are now entitled to share the value of everything acquired during the marriage whether it is terminated by separation, divorce or death. Similar to its predecesor, the Act adopted a deferred sharing system. The basic concept underlying this system is that all

property acquired by either spouse during marriage is to be shared equally when the marriage partnership is dissolved. Until this point is reached, both spouses are separate as to property. The owner of the property can deal with it as he or she thinks fit. Once the marriage has broken down, an accounting takes place, the assets of both spouses are ascertained and from these are deducted certain types of propertry exempted from division, such as property brought into the marriage, gifts or inheritence a spouse received during the marriage. The matrimonial home must always be brought into calculations of net family property. The spouse with the lower net family property value deducts it from the net family property value of the spouse with the higher figure, and is then entitled to half the difference between the two figures. The payment of the difference is known as the equalizing payment.

Currently, it does not seem that division of matrimonial property receives as much interest from Canadian feminists as other areas of family law such as custody and access. This may be due to the fact that the Act has just come into force and it is too early to assess its impact. However there has been some criticism that the Act does not take into account the fact that spouses' actual contributions to marriages can be quite different along gender lines. Further, since the Act provides that the court may order unequal division in limited circumstances which make the equal division unconscionable, it is predicted that there will be a volume of litigation for the court to define the circumstances that justify an unequal divison. According to one writer, this trend is unlikely to benefit women.[81]

4.6 Maintenance and Support

---

81 Mary E. Morton, "Dividing the Wealth, Sharing the Poverty: A Feminist Analysis of the Role of Law in the (Re) Formation of the family.", The Canadian Review of Sociology & Anthropology, Vol. 25, May, 1988.

By the broad term "maintenance and support" I refer to both spousal support and child support. In Thailand, there is very little legislation on these questions. As far as child support is concerned, the law provides simply that the divorcing spouses must agree as to what proportion of child support each would contribute. If no agreement is reached, this would be determined by the court.[82] Thus, the law concerning child support is stated in a very broad and general terms leaving wide discretion to the parties and the court in this matter. It should be noted that child support is regarded as both spouses' obligation so that the means and capabilities of each spouse would play an important role in this question. There has been no research on the application and enforcement of the law in this area.

With regard to the question of maintenance or spousal support, this is provided in Section 1526 of CCC, Book V, 1976. The provision is gender-neutral. Entitlement to spousal support is based on fault of the other spouse against whom the claim is brought. An action for maintenance or support must be brought concurrently with the divorce proceeding. Since entitlement depends on proof of fault on the part of a delinquent spouse, the action can only be brought by an innocent spouse. In awarding support, the court must take into account the means and capabilities of the payor and the payee. Apart from this, no other guidelines are provided to the court. Again, there has been no reserch on the question of spousal support and this issue has hardly been raised by Thai feminists.

In Canada, a claim for spousal support was traditionally available to a wife. Most forms of matrimonial relief were fault based, depending upon the respondent being proven to have been

---

82 Section 1522, CCC Book IV, 1976.

guilty of some matrimonial offences.[83] During the last twenty years, there has been a shift away from these old concepts of fault and a dependent wife. Under the 1968 Divorce Act, fault on the part of the respondent was not a prerequesite to the obtaining of a divorce, nor to the award of support. Husbands were eligible for an award of maintenance as well as wives. Provincial legislation passed in the 70s and 80s followed this trend. The underlying philosophy for the new support legislation is that each spouse has an obligation to provide suport for him or herself and for the other spouse in accordance with need and to the extent he or she is capable. There is an obligation on each party to be self-supporting and support is premised on need rather than on fault.

The Divorce Act, 1985, makes substantial changes to the law of support in divorce. Section 15(7) sets out the objectives that the court must follow in determining spousal support. Section 15(6) explicitly provides that in making support order, "the court shall not take into consideration any misconduct of a spouse in relation to the marriage". In addition, Section 15(7)(d) states that an order made by the court should in so far as practicable promote the self-sufficiency of each spouse within a reasonable period of time. These changes reflect the high incidence of divorce and changes position of women both in society and with the family.

The emphasis put on self-suficiency has given rise to concerns. It means that the court should encourage self-sufficiency by awarding support only until self-sufficiency is or should be attained. To this end there has been growing number of cases in which maintenance is awarded for a specific time or on a diminishing basis. It must be admitted that in general, women

---

83 See the Deserted Wives' and Children's Maintenance Act, R.S.O. 1970, C. 128 and
the Matrimonial Causes Act, R.S.O. 1970, C. 265

are still disadvantaged in the market place and many women still devote their lives to traditional role of housewife and child-rearer with their husband 's encouragement. After separation and divorce, it may not be easy for them to get out into the work world, especially if the divorce comes after a lengthy marriage and if the wife is no longer young enough to compete outside the home.

The statistics revealing the economic plight of single parent families headed by mothers are depressing. It has been said that 43 per cent of female-headed single parent families live below proverty line, compared to only 14 per cent of male-headed single parent families. Only 65 per cent of custodial parents are awarded any child maintenance, and only 18 per cent of those custodial parents are awarded periodic payments for themselves. Thus, it has been argued that the new divorce law with its emphasis on a financial "clean break" ignores the poverty endured by women and their children.[84]

One factor which has contributed to the economic plight of divorced mothers and their children is the high default rate in paying support. In Ontario, it was estimated that in the area of support alone, a full 85 per cent of orders were in default at any one time.[85] As a consequence, the Ontario Government passed the Support and Custody Orders Enforcement Act in 1987. This Act establishes the Office of Support and Custody Enforcement and provides it with powers to enforce support and custody orders. The main objective of this support and custody enforcement programs is to relieve the costs involved for individuals to start legal enforcemnt procedures in cases of default. By filing

---

[84] Louis Lamb, "Involuntary Joint Custody: What Mothers Will Lose if Fathers' Rights Groups Win", Horizon, Jan/Fev. 1987, p. 23

[85] See the brochure on Support and Custody Enforcement Program, Ministry of Attorney General

a support order with the Support and Custody Enforcement Program, the defaulters will be located and support orders will be enforced. If no payment is made, harsher actions such as garnishing of wages or seizing of defaulters' assets, may be taken. The program also enforces custody orders in cases where there is a serious failure to return a child or possible abduction.

In conclusion, it is evident that Canadian law provides more than Thai law on the issues of maintenance and support. This may be due to the fact that there is a higher rate of divorce in Canada and thus it has become necessary to legislate more on consequences related to marriage breakdown. However, it is desirable that Thailand should develop more provisions dealing with custody and support especially since these issues also affect children directly. It is unfortunate that the legislature has given little consideration to these problems.

4.7 Mediation

Mediation in marital disputes has never been discussed or introduced in Thailand. While mediation is being used in Canada, it is not considered as an alternative to litigation, generally termed as the adversarial system. Mediation involves the use of an independent third party who seeks to bring the parties to an agreement. It has been argued that this process is preferable to the adverserial system where the parties are involved in bitter court fights.

The advantages of mediation have been said to be as follows. First, this process would enable the parties to agree on a solution rather than having one imposed upon them by the court. There is a higher chance that resolution achieved through mediation will last longer than one achieved after a bitter court battle. Also litigating a family law matter is expensive, time-

consuming, and divisive. At the end of the process, the relationship between the litigants is even more severely damaged. All suffer through the process, especially the children.[86]

However, mediation has also many disadvantages. By and large it is still an unregulated business so that anyone can become a mediator. One must admit that it requires some sophisticated skills to mediate family law disputes so that mediation conducted by someone without proper training can be unfair. Of particular concern to women is the fact that mediation assumes that both parties are equal in their bargaining powers. Since women are usually the less powerful party, mediation may fail to provide full protection and thus force the weaker party to accept a resolution which gives her far less than she would be entitled to in a financial adjudication. Further, lower child support may be agreed to because of the very strong pressure women feel in family disputes to give up monetary benefits to be assured of custody.

The 1985 Divorce Act, Section 9(2) imposes an obligation on a lawyer acting for a spouse to discuss the advisability of negotiating custody and support matters and to inform the spouses of mediation facilities that might assist the spouses in settling those matters. A lawyer must certify on any court document that he or she has complied with the section. Therefore it seems that the law recognizes that mediation can be an effective supplement in the judicial process. It would be more desirable, however, if the law should also regulate on the qualifications of mediators.

---

[86] Sachs, "The Dejudicialization of Family Law: Mediation and Assessment." Sloss ed. Family Law in Canada: New Directions, Canadian Advisory Council on the Status of Women, Ottawa, 1985, Reproduced in Hovius' Cases & Materials in Family Law.

Currently, the fathers' rights group which openly supports mediation as a model for settling custody disputes is the Council for Co-Parenting. While Canadian feminists have not developed a position of objecting to mediation per se, they do object to introducing mandatory mediation in family law disputes. Mandatory mediation has already been adopted by some American states such as California. In any case, it has been urged, mediation should be excluded from all disputes involving domestic violence.

5. Conclusion

This paper represents my effort to conduct a comprehensive survey of Thai and Canadian law and women particularly in the areas of criminal law and family law. Due to lack of time I cannot discuss all the topics in as much depth as I have wished to. The overall impression from this study is that Canadian women have achieved much more than Thai women in securing not only equality before the law but also equal benefits of the law. In some areas such as sexual assault offences, the state of the law in Canada represents the proposed law reforms Thai feminists are asking for. However, in some other areas such as prostitution and abortion, the problems are similarly unresolved in both countries.

As far as family law is concerned, there is much more legislation in Canada than in Thailand. Some issues, such as maintenance and support, custody and access, are hardly touched upon by Thai family law. This is probably due to the fact that divorce is a more common phenomenon in Canadian society and therefore there is a need to legislate in more details in this area. Canadian feminists also play a much more active role in family law debate than Thai feminists.

Perhaps the unique feature of Canadian law as related to women is the Charter of Rights and Freedoms. Canada has reached the stage where discrimination on the face of particular legislation is no longer an issue. The "equal benefit" clause in Section 15 enables women to tackle systemic discrimination in a way which cannot be done in many countries. It is believed that the Charter will continue to play an important role in the area of women's rights for many years to come.